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No. 88-391

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JAMES J. KRAJEWSKI, Individually and in his capacity as Judge of the Lake County Court, Division III

Petitioner,

v.

STEVEN A. KUROWSKI and DAVID H. NICHOLLS

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Seventh Circuit correctly applied Branti v. Finkel to hold that party affiliation was not an appropriate requirement for the effective performance of respondents' job of public defender.

Whether any justification exists for this Court to clarify the Branti test or to review its decision protecting the free association rights of government employees.

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Petitioner,

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STEVEN A. KUROWSKI and DAVID H. NICHOLLS

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

Respondents, Steven A. Kurowski and David H. Nicholls, respectfully oppose the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh

Circuit entered in the above-captioned cause on June 2, 1988.

OPINIONS BELOW

In addition to the opinions noted in the Petition for Writ of Certiorari, at page 2, opinions were entered in this case holding the petitioner in contempt of court for violating the order to reinstate the respondents and to refrain from retaliating against them. The Magistrate's findings are reported at A-44 and the Judge's affirmance at A-41 in Appendix to Petition.

JURISDICTION

See Petition for Writ of Certiorari, at page 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See Petition for Writ of Certiorari, at pages 2-3.

STATEMENT OF THE CASE

This case involves the politically motivated dismissals of the respondents from their positions as public defenders. David H. Nicholls and Steven A. Kurowski were appointed to serve as public defenders of the Lake County Court, Division III, in January, 1979, and July, 1981, respectively. In February, 1985, the petitioner, Judge James Krajewski, was appointed as temporary Judge of Lake County Court, Div. III, and he became permanent Judge of that court in June, 1985. Both respondents, as the petitioner knew, were active Democrats. Tr. 23 and 72. Soon after taking his position, Judge Krajewski told the respondents that although he was pleased with their performance, he was under significant pressure from Republicans for their jobs. Tr. 100-102, 128.

On December 12, 1985, Judge Krajewski fired the respondents, asserting as the only

reason for their discharge the significant political pressure from the Republican party. Tr. 70. There were no accusations of wrong-doing or of a "taint" on the court. Tr. 38 and 71. Contrary to the implications in the petitioner's Statement of the Case, Judge Krajewski never made any allegations or accusations to either of the respondents concerning their involvement in any of the "scams" which lead to the indictments in that court, Tr. 38 and 71; and he conceded at trial that he had no knowledge of any wrong-doing on their part. Tr. 117. The Judge, in fact, asked the respondents on the day he fired them if either would be willing to serve as judge pro tem the following month when he would be on vacation. Tr. 36-37 and 71. As the Court of Appeals found, "This is not the path trod by one intent on turning out rascals." A-8.

More significantly, the petitioner misrepresents the facts concerning the

position of public defender, suggesting that serving as judge pro tem was part of that job. As the Court of Appeals found, "judicial service is not part of a public defender's duties in Indiana." A-6, citing to Indiana Trial Rule 63. Further, respondent Nicholls testified without contradiction that he could not recall ever serving as judge pro tem after Judge Krajewski's appointment in February, 1985, although he was an assistant public defender in his court for eleven months. A-6.

Indiana Trial Rule 63(E) permits a trial judge to appoint a judge pro tempore to serve in his absence, and public defenders, together with many private practicing attorneys in Lake County, were occasionally called upon by the judge to serve. Both courts below found, however, that this did not render judicial service a part of the position of public defender. The Magistrate concluded that the

petitioners here "were public defenders not judges, although on occasion they along with other practicing attorneys in Lake County were asked to sit as judges pro tem." A-33. The Court of Appeals found that there was no material factual dispute regarding the question of whether judicial service was part of a public defender's duties in Indiana. A-6. Thus the courts below, which heard the evidence and are familiar with the operation of the Lake County Court system, held contrary to petitioner's allegation, that serving as judge pro tempore was simply not a part of the job of pauper counsel.

REASONS AND ARGUMENT FOR DENYING THE WRIT

I

THE COURT OF APPEALS CORRECTLY FOLLOWED THE SUPREME COURT HOLDING IN BRANTI v. FINKEL THAT PARTY AFFILIATION IS NOT AN APPROPRIATE REQUIREMENT FOR THE EFFECTIVE PERFORMANCE OF A PUBLIC DEFENDER.

The Supreme Court held in Elrod v. Burns, 427 U.S. 347, 375 (1976) that

government employees may not be dismissed solely for exercising their First Amendment freedoms of political association. Although it left open a possible exception in the case of policymaking or confidential employees, this Court subsequently clarified that, rather than relying upon labels, the relevant question was "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Branti v. Finkel, 445 U.S. 507, 518 (1980). The defendant carries the burden of proof on the issue of whether employees occupy a non-protected position. Elrod, 427 U.S. at 368.

The Supreme Court in Branti specifically examined the same position involved in this case, namely that of public defender, and concluded that this was not a position as to which political affiliation can or should be relevant:

> ...it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the state. 445 U.S. at 518.

The Court, in fact, noted the impropriety of allowing political considerations to enter into the selection of attorneys who serve in the sensitive position of public defender. 445 U.S. 518 n.14. Thus, even if there is some question after Branti as to which positions are protected from political discharge, certainly this is a poor case to resolve the issue because the position of public defender has already been fully explored by this Court.

The petitioner's attempt to characterize the position in question here as "unique" is totally unfounded. As

revealed in the Statement of Facts, Judge Krajewski retained Steven A. Kurowski and David H. Nicholls to serve as public defenders. The fact that public defenders, together with private practicing attorneys in Lake County, were occasionally called upon by the Judge to sit as pro tem did not alter the nature of this position. As the lower courts both found in this case, sitting as judge pro tem was never a part of the duties of the office, and, in fact, the testimony revealed that at least one of the respondents never even sat as pro tem during the eleven-month period in which he served as public defender for the Judge. Thus the petitioner's manufactured federalism argument, asserting a state's right to have elected judges, has absolutely no relevance to this case. As stated in the Petition for Writ of Certiorari, at page 11, federal courts should be guided by how the state or county has defined the position. This is

precisely what the lower courts did here, focusing on Indiana Trial Rules regarding the position of judge pro tem, as well as on the operation of the public defender system in Lake County, Indiana. A-6.

Next, petitioner argues the position was "unique" because here the assistant public defenders made decisions about the operation of their office. However, the only "policy" discussed is that the respondents decided on their own which days they would work -- certainly not the type of determination which would be affected by political affiliation. Petitioner's contention that respondents made their own decisions regarding plea agreements, motions to file, etc. and thus lacked any written guidelines for their job was precisely the concern which motivated the Court in Branti to uphold the protected posture of this position. The Court in Branti stated that it would "undermine, rather than promote,

the effective performance of an Assistant Public Defender's Office to make his tenure dependent on his allegiance to the dominant political party." 445 U.S. at 518. The lack of guidelines simply reflects the necessary independence of the office. As this Court found in Branti, political loyalty to an employer is unrelated to the effective operation of the public defender system and in fact threatens the integrity of that system: "Whatever policy-making occurs in the Public Defender's Office must relate to the needs of individual clients and not to any partisan political interests." 445 U.S. at 519. In short, the allegations made by petitioner regarding the "unique" qualities of respondents' position are all factual questions which were decided

against the petitioner by the lower courts,[1] and are not an appropriate subject for a certiorari petition.[2]

II

THERE IS NO CONFLICT IN THE CIRCUITS REGARDING THE QUESTION OF PROTECTED POSITIONS UNDER BRANTI NOR IS THERE A NEED FOR FURTHER GUIDANCE FROM THIS COURT.

Petitioner's key argument for granting certiorari in this case is an alleged conflict between the Seventh and Eighth Circuits regarding which positions are

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[1]Petitioner also attempts for the first time in this litigation, to distinguish this case as involving part-time, rather than full-time employment. Respondents fail to see how this affects the constitutional right not to be penalized for political association. In any event, because this issue was never raised nor discussed by the courts below, it is not an appropriate question to be resolved at the first instance by this Court.

[2]As Justice Frankfurter noted, the Court should not grant certiorari "merely to review facts already canvassed by two and sometimes three courts." Wilkerson v. McCarthy, 336 U.S. 53 (1949) (concurring opinion).

protected under Branti. Citing the Tenth Circuit decision in Dickeson v. Quarberg, 844 F.2d 1435 (10th Cir. 1988), petitioner claims that whereas the Seventh Circuit focuses on the position in the abstract, the Eighth Circuit focuses on what the person in the particular position actually does. Petitioner has misstated the reasoning in Dickeson. The court did refer to a Seventh Circuit holding that a government employer should not lose his right to discharge an employee simply because that officeholder performs fewer or less important functions than usually attend the position. Tomczak v. City of Chicago, 765 F.2d 633, 641 (7th Cir.), cert denied, 474 U.S. 946 (1985). One cannot conclude from this, however, that the Seventh Circuit looks only at the position in the abstract. Indeed as the Dickeson court proceeds to note, subsequent Seventh Circuit decisions have sounded a "cautionary note" that each individual

office must be carefully examined as to job responsibilities. Dickeson, 844 F.2d at 1442, citing Meeks v. Grimes, 779 F.2d 417, 420-422 n.2 (7th Cir. 1985). The Tenth Circuit concludes, "We discern little difference between the Seventh Circuit test as qualified by Meeks and the Eighth Circuit test as articulated in Horton." Dickeson 844 F.2d at 1442. Petitioner's reliance on Dickeson to substantiate an alleged conflict in the circuits is faulty to say the least. He has taken one statement out of context, and has failed to mention the court's significant conclusion that there is "little difference" in the tests which have evolved.

In this case the lower court did in fact look to the responsibilities of the job in question and did not examine the position "in the abstract". The Seventh Circuit reasoned that if plaintiff's job in fact included the duty of serving as judge pro tempore, Judge Krajewski would have been

justified in applying political criteria: "We must ask what the powers of the actual office were..." A-6. The court then concluded that judicial service was clearly not a part of the duties of a public defender in Indiana. A-6. This was based on an examination of Indiana Statutes, as well as the testimony regarding operation of the court system in Lake County, and the uncontroverted testimony that one of the respondents never even served as pro tem.

Further, there is no reason to seek clarification from the Supreme Court on the question of which positions are protected from political patronage practices. The highly fact-sensitive nature of this issue makes the articulation of specific standards impossible. Branti provided significant guidance to the lower courts by stipulating that the relevant question was whether political affiliation would affect the way in which the office holder performed his

functions. This standard has clearly assisted the government and the courts by putting government on notice as to what it must prove in order to justify a politically motivated dismissal and by enabling the courts to focus immediately on the relationship between political beliefs and effective job performance without dealing with the vague labels of policymaker or non-policymaker. See Note, "Patronage Dismissals and the First Amendment" 25 ST. LOUIS UNIV. L.J. 189, 206-207 (1981).

Contrary to petitioner's assertion, the lower courts have developed a consistent body of criteria to assess whether political affiliation is an appropriate criterion for effective performance of a particular job. In Brown v. Trench, 787 F.2d 167, 169, (3rd Cir. 1986), relied upon by the petitioner, the court lists the relevant factors without any mention of a conflict in the circuits.

Indeed the Third Circuit proceeds to follow the Seventh Circuit holding that the key question is whether an employee has meaningful input into the decisionmaking process. 787 F.2d at 169-170. The First Circuit has recently commented on the considerable body of case law from the circuit courts of appeal:

> This seems a helpful corpus because of the variety of governmental positions considered, the additional inquiries made...and the overall coherence and consistency of these lower court decisions. Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 240-241 (1st Cir. 1986)

As the First Circuit notes, the question of protected positions does not lend itself to one single standard or criterion. Rather the lower courts have set up guidelines and, thus far, there do not appear to be any stark inconsistencies as to what those guidelines should be.

III

THE SUPREME COURT SHOULD NOT OVERRULE ITS EARLIER CASES PROTECTING POLITICAL AFFILIATION.

The Supreme Court should proceed with caution in deciding to overrule a previous decision, in this case one which is only twelve years old. This Court has noted that "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984). Petitioner argues that the effectiveness of government has not improved since Elrod was decided and therefore the decision should be overruled. General conclusory statements of this nature should certainly not provide the basis for overturning Supreme Court precedent. In Vasquez v. Hillery, 474 U.S. 254, 266 (1986), this Court noted that "detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into

agreement with experience and with facts newly ascertained'." No such evidence has been introduced in this case.

In Elrod and Branti the Supreme Court cited the tremendous growth in public employment in the twentieth century and the need to provide some type of job security for government employees. The Branti standard protects the government's interest in insuring the political loyalty of those employees who implement partisan administrative policies and programs, and, at the same time, it protects government efficiency by insuring that competent experienced employees are not terminated simply because they are of the wrong political persuasion. Politically motivated terminations do not promote effective efficient government. This is no less true today than it was twelve years ago.

CONCLUSION

The Petition for Writ of Certiorari should be denied because (1) the Court of Appeals for the Seventh Circuit correctly applied the Branti standard regarding the protected position of public defender; (2) there is no conflict in the circuits as to the proper application of the Branti standard nor is there a need for further guidance from this Court; and (3) there is no reason for the Court to overrule its holding in Elrod.

Respectfully submitted,

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